BRIEF

In Support of Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT.

I.

The jurisdiction of this Court is clear.

Federal Employers' Liability Act, 45 U. S. C. A., Sec. 51, Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65;

Judicial Code, Sec. 237, as amended by the act of February 13, 1925, Chap. 229, 43 Stat. 937, Title 28, U. S. C. A., Sec. 344;

Steeley v. Kurn et al., 313 U. S. 545, 61 S. Ct. 1087, 85 L. ed. 1512;

Seago, Adm'x, v. N. Y. Cent. R. Co., 315 U. S. 781;

Stewart v. Southern Ry. Co., 315 U. S. 283;

Brady v. Southern R. Co. (not yet officially published), 88 L. ed., Adv. Op. 189, 191.

II.

Decedent's negligence in voluntarily and knowingly assuming a position of certain, extreme, and imminent peril instead of passing across the track to a position which was perfectly safe, and then giving the signal for the movement which killed him, was the sole proximate cause of his death.

Davis, Agent, etc., v. Hand, 290 F. 731 (certiorari denied 263 U. S. 705, 68 L. ed. 516, 44 S. Ct. 34);

Atlantic Coast Line R. Co. v. Driggers, 279 U. S. 787, 73 L. ed. 957;

Atlantic Coast Line R. Co. v. Davis, 279 U. S. 34, 73 L. ed. 603, 47 S. Ct. 210;

B. & O. R. Co. v. Newell, 196 F. 866.

III.

The proximate cause of Hertz' death was the slack movement. The alleged fact that the four southernmost cars moved a distance of twelve feet in response to this slack movement cannot affect the question of proximate cause, for the reason that Hertz had already been killed when the cars moved the first few inches at the commencement of that movement.

Southern R. Co. v. Walters, 284 U. S. 190, 194, 76 L. Ed. 239, 242;
Hunt v. Kane, 100 F. 256.

IV.

Petitioner's evidence as to the distance the car which killed decedent moved is not impeached, contradicted or in any way attacked. The testimony as to twelve foot movement applied only to the four southernmost cars, whereas the car which killed decedent was the car immediately north of the north car of those four. Consequently, both the trial court and the court below was under a duty to accept the testimony of petitioner and decide this case accordingly. This the court below refused to do, and in so doing wrote an opinion directly in conflict with the decisions of this Court supporting the position of petitioner.

P. R. R. Co. v. Chamberlain, 288 U. S. 333, 77 L. ed. 819;
Chesapeake & O. R. Co. v. Martin, 283 U. S. 209, 215, 216, 217, 218, 75 L. ed. 983, 987-989;
Brady v. Southern R. Co. (not yet officially published), 88 L. Ed., Adv. Op. 189;
Southern R. Co. v. Walters, 284 U. S. 190, 194, 76 L. Ed. 239, 242.

ARGUMENT.

I.

The jurisdiction of this Court can scarcely be questioned, in view of the decisions cited under I in the Summary of Argument.

It is desired to call to the Court's special attention, however, the following language from Brady v. Southern R. Co. (not yet officially published), 88 L. ed., Adv. Op. 189, 191:

> "There is thus presented the problem of whether sufficient evidence of negligence is furnished by the record to justify the submission of the case to the jury. In Employers' Liability Cases, this question must be determined by this Court finally. Through the supremacy clause of the Constitution, Art. VI, we are charged with assuring the act's authority in state courts. Only by a uniform federal rule as to the necessary amount of evidence may litigants under the federal act receive similar treatment in all states." (Citing cases.)

II.

The evidence showing decedent's sole negligence to be the proximate cause of his injury has heretofore been stated. The uncontradicted testimony discloses that decedent was an experienced switchman who had been working with this particular crew for more than a year and who had been coupling and uncoupling cars on the barge, where he was killed, practically every night during that period. On the night of his death he (or anyone else) for the first time so far as anyone knew, attempted to uncouple cars from the west side of the track immediately adjacent to the loading platform; on all previous occasions he and everyone else had done the uncoupling from

the opposite side of the track. Thus, on the occasion of his death he for the first time chose a highly dangerous position to do this work.

After having done so, he himself asked for the slack movement which resulted in his death. The movement was made in response to his signal, and according to the overwhelming weight of the evidence, if not the unwholly uncontradicted evidence, the movement was made in the usual manner.

The court below holds that this evidence does not prove as a matter of law that there was any "certain danger or extreme peril, nor even negligence, in the manner in which Hertz was proceeding to lift the pin."

The conclusion reached by the court on this point is impossible to sustain under the law. The very fact that decedent was killed in this slack movement is sufficient to show conclusively that he was in a position of extreme and certain peril. The Congress has recognized that such a position is extremely hazardous and in response to such recognition has passed the Safety Appliance Act with respect to couplers opening and closing, without the necessity of anyone's going between the cars to open or close them. This act of Congress creates liability upon the railroad upon a mere showing that the couplers failed to couple or failed to uncouple without the necessity of a switchman's going between the cars. The railroad company is made liable for injuries to switchmen or brakemen who are injured by reason of the failure of such couplers to couple or uncouple without any proof of negligence on the part of the railroad company; that is, without any proof that the railroad company acted or failed to act in a careful and prudent manner. The fact alone of the happening of the accident fastens liability upon the railroad company.

Moreover, respondent in her petition pleads in every paragraph thereof save one which does not charge neg-

ligence in the character of the movement of the train, that while he was standing at the point where he was killed decedent was in a position of imminent peril. Despite the recognition by the Congress that such a position is hazardous, despite respondent's own pleading to that effect, and despite the fact that decedent was killed because he was in such a position, the court below has refused to hold that as a matter of law decedent was in a position of peril while uncoupling these cars. That such a holding is unsound can scarcely be denied upon any ground.

It is manifest in this record that decedent was guilty of gross negligence in assuming the position he did for the purpose of uncoupling these cars. The distance between the side of a car and the edge of the loading platform was no more than six or seven inches (R. 19). On the side of each car next to the loading platform is a ladder composed of grabirons. The distance between these grabirons and the edge of the dock is but three or four inches (R. 33).

On the opposite side of the track on the barge was another track which at the time of decedent's death had no cars standing upon it. Decedent could very readily have moved to the opposite side of his track and uncoupled the cars from that point where he would have been perfectly safe (R. 39), and where the switch foreman expected decedent to be at the time the slack was given (R. 36). The foreman had every right to expect decedent to move to the other side of the truck, because for more than a year decedent and all other switchmen had uncoupled these cars from the opposite side of the track (R. 35, 36).

There was ample time for decedent to have moved from the dangerous position to the safe one between the time he gave the signal for the slack movement and the time the slack movement came, because there was a delay of several minutes while the air was pumped up for the

purpose of releasing the brakes on all of the cars of the train except the four which were to be left there (R. 31, 32). Indicative of the elapsed time between the stops made for spotting the cars and the slack movement, is the testimony of respondent's own witness Mulvaney that during the period he broke the seals on the door of the third car from the south end (R. 55), looked inside and saw how the freight was "put in that car" (R. 50); then walked two car lengths to the southernmost car (R. 50), broke the seals on that car door (R. 56), and opened the door of that car (R. 50, 56), and was standing on the dock platform at the time the slack movement came (R. 50). The elapsed time between the time decedent got down between the cars and the happening of the accident was twelve minutes (R. 70, 71); and between the time the foreman last saw decedent alive and the accident was about seven minutes (R. 71). There was a wait of from three to five minutes between the time that the foreman passed decedent's signal for slack and the giving of the slack itself (R. 31, 32).

None of the facts last above stated is contradicted, impeached or attacked in any way. They may be taken, therefore, as the actual facts with respect to the question now being discussed. Under the authorities cited, supra, under Summary of Argument, II, decedent was guilty of gross negligence in voluntarily and knowingly choosing a highly dangerous position to uncouple the cars mentioned in evidence when he well knew and had used for more than a year a perfectly safe way of doing the work. There is no evidence whatever of any negligence on the part of petitioner in respect to that movement. Therefore, decedent's own negligence was the sole proximate cause of his injury.

III.

It is contended by respondent, and the court below affirms respondent's verdict on the theory, that the proximate cause of decedent's death was the twelve foot movement of the cars.

As above indicated, one of respondent's witnesses testified that the four southernmost cars which were to be uncoupled and left on the loading dock, moved a distance of twelve feet following the slack movement (R. 50, 51). No other witness so testified. But that same witness testified that he did not know how far the remaining cars, that is, the cars which were still coupled to the locomotive, moved when the slack movement was made (R. 56). Decedent was not killed by any one of the four cars which respondent's witness testified moved a distance of twelve feet. He was killed by the fifth car, the last car which was to remain coupled to the locomotive. Where is the evidence that car moved twelve feet? Unless that car moved an unsual distance, there can be no liability upon petitioner even under respondent's theory. There is no such evidence.

The switch foreman testified that the fifth car, the car which killed decedent, moved from a foot to a foot and a half (R. 28); the sole eye-witness to this casualty said that the fifth car which caught decedent moved between two and four feet (R. 99, 105). There was no other witness at that point at that time who could testify specifically as to the movement of that particular car. The head brakeman was standing on the top of the third car south of the locomotive. That car moved no more than four or five inches (R. 96); the locomotive scarcely moved, not over six or eight inches (R. 80).

There are, however, conclusive physical facts and undisputed wholly credible testimony which show overwhelmingly that it was impossible for the four southernmost cars to have moved twelve feet when the slack movement

was made. In the first place, it is testified by the locomotive engineer and the head brakeman that in response to the signal for slack, the locomotive engineer did not use any steam power for the purpose of giving the slack, but did no more than momentarily release the air brakes and permit gravity to pull the cars towards the south for the purpose of giving slack (R. 76, 96).

All of the testimony on the subject discloses that decedent had separated the air hose between the fourth and fifth cars from the south end of the cut of cars, and had opened the angle cock on the north end of the fourth car, thereby draining all of the air from the reservoirs on the four cars, and setting the brakes hard against the wheels on those cars (R. 22, 23, 24, 38). The setting of the brakes on these cars rendered it practically impossible that these four cars could have been moved any appreciable distance by the slack movement, as the brakes were set on them too hard (R. 77). Moreover, the undisputed evidence of both the head switchman and the foreman, both of whom were standing on the tops of cars, was that if the cars had been moved that distance, each of them would have been knocked off the cars or would have had to make a long run to counteract the force of the collision (R. 90, 96). Even respondent's witness who testified that the four cars had moved a distance of twelve feet, when asked whether the movement was slow or fast, said: "Well, it didn't move any too fast for the simple reason if he had moved too fast he would have probably hit the bumper post at No. 1 spot" and that did not happen (R. 51); and he refused to say that it was a violent movement (R. 51).

We find, therefore, that a single witness testified that the four southernmost cars moved a distance of twelve feet as a result of this slack movement; but he did not know how far the car which killed decedent moved. Set off against that testimony is that of the engineer, head

switchman and foreman, together with the physical facts that cars with brakes set hard cannot be moved that distance without the use of steam power and only by the force of gravity.

Moreover, the undisputed evidence shows that it was not the twelve foot movement which killed decedent, but that he was killed at the commencement of the slack move, when the southernmost car which was to be left connected with the locomotive had moved no more than a few inches. The truth of this testimony is attested by the physical fact that decedent was caught and remained between the ladder on the side of the car (the south end of which was only three or four inches from the south end of the car) and the loading dock platform. Therefore, it could not have made any difference how far the cars moved after decedent was caught and killed. The proximate cause of his injury must necessarily have been the first few inches of the movement when the slack was given. There is and can be no contention that those first few inches of that movement could in any way have been negligent, because that movement was the inevitable result of decedent's own signal for slack; and because he had voluntarily and purposely chosen a position of imminent peril. His own action in so doing was obviously the proximate cause of his death.

IV.

The opinion of the court below holds that neither it nor the trial court was bound by the testimony of both the engineer and of the head switchman that the engineer did not use any steam power to give this slack movement (R. 76, 96); or by the testimony of the sole eye-witness that decedent was caught and killed within the first few inches of the slack movement (R. 100, 105).

In the opinion of the court below it is said with reference to the testimony of the engineer and the head switchman that no steam power was used:

> "Appellant assumes, as a matter of law, the truth of the testimony of defendant's witness that no power other than the force of gravity was applied in making the slack movement."

With respect to the testimony of the eye-witness that decedent was caught "just as soon as the movement started" the court below said:

> "Appellant relies upon a literal interpretation of the testimony of a witness for defendant, who used the words 'caught just as soon as the movement started,' and appellant insists that the witness' testimony is 'uncontradicted, unimpeached and unattacked in any way' and his conclusion is binding upon the trial court and upon respondent. The evidence, however, is not as limited as appellant contends and inferences, other than those mentioned, may be drawn from the evidence."

This statement will not stand examination. Petitioner does not now and did not in the court below rely upon any "interpretation," literal or liberal, of the testimony of the sole eye-witness. There is no occasion or reason for any interpretation of his testimony. He stated bald facts, namely, that decedent was "caught just as soon as the movement started." There is no room for an interpretation of that language. This is a statement of fact, not a "conclusion" as the court below characterizes it. Obviously this witness meant exactly what he said and said exactly what he meant. He was the only person who saw this casualty and who could know what happened at the exact moment decedent was caught and killed. He has testified positively and unequivocally that decedent was caught and killed just as soon as the slack movement was commenced. No jury and no court has a right to find in the face of this unqualified, unattacked, unimpeached, and entirely reasonable testimony (especially in view of the conceded physical facts showing where decedent was found

after the slack movement was over and the position of the ladder on the car) that decedent was not caught and killed at the commencement of the slack movement. A finding of that sort would be based not only upon a lack of evidence but upon a theory directly contrary to the only evidence in the case.

It seems quite clear that the court below has failed to follow the decisions of this Court, cited in the Summary of Argument, under IV, which hold that evidence of the character of that of the engineer, the head switchman, and the sole eye-witness, when uncontradicted, unimpeached, not contrary to physical laws, and in no way unbelievable, must be accepted by both the court and the jury as true, and the finding and judgment must be based upon the truth of such testimony. If that were not true, the verdict, finding and judgment would of necessity be based upon the exact contrary of the testimony, and would permit a plaintiff to put witnesses on the stand and by them prove a certain state of facts, and then demand of the jury a verdict directly in the face of and contrary to the testimony, and it would have to be affirmed by the appellate court. This court recognizes no such principle of law.

In conclusion, petitioner submits that this record contains no evidence which places responsibility upon it for decedent's unfortunate death; the opinion of the court below is manifestly erroneous, and contrary to the holdings of this Court upon the points here raised, and should not be permitted to stand.

Respectfully submitted,

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